

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CATHERINE SMITH
Claimant

VS.

SOPHIE'S DELI & CATERING, INC.
Respondent

AND

CONTINENTAL WESTERN INS. CO.
Insurance Carrier

Docket No. 1,029,534

ORDER

Claimant and Respondent requested review of the July 9, 2007 and July 20, 2007¹ Awards by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on November 6, 2007.

APPEARANCES

Dennis L. Horner, of Kansas City, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

¹ A Nunc Pro Tunc Award was entered on July 20, 2007 to correct an error in calculating the compensation rate and the resulting overpayment of temporary total disability benefits.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant a 14 percent permanent partial impairment to the whole body as a result of her July 13, 2005 accident.²

Both parties have appealed this Award taking issue with the ALJ's finding with respect to the claimant's permanent impairment. Claimant contends the only credible medical opinion was that offered by Dr. Stuckmeyer, who assessed a 20 percent to the whole body pursuant to the 4th edition of the *Guides*.³ Conversely, respondent maintains that Dr. Holladay's assessment of 8 percent is the only appropriate and accurate medical opinion contained within the record. Each suggests the Board should modify the Award to reflect their respective experts' opinions.

In addition, claimant takes issue with the ALJ's failure to award her reimbursement of the medical expenses incurred as a result of her back surgery. The ALJ concluded that those expenses were unauthorized and thus any recovery was limited to the \$500 allowance afforded by K.S.A. 44-510h(b)(2). Claimant argues that these expenses should be considered authorized because respondent, acting through its owner Betty Kolenda, authorized claimant to seek treatment with a chiropractor and that provider, in turn, then referred her care to Dr. Holladay, who performed surgery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant works as a catering director for respondent, a company that is owned by Betty Kolenda, claimant's mother. The uncontroverted evidence establishes that claimant suffered a compensable injury to her low back on July 13, 2005 while lifting cases of soda and water into the company van. Claimant informed Ms. Kolenda of her low back and leg pain and Ms. Kolenda told her to seek an adjustment from the family's chiropractor, Dr. Harding. After a short period of time claimant's significant back and leg pain did not

² The Award contains additional findings with respect to the compensability of this claim and the appropriate average weekly wage. But the parties have agreed that the only issues to be addressed in this appeal are the nature and extent of claimant's impairment and respondent's responsibility for the medical bills associated with claimant's back surgery. The remaining issues are not disputed and can be summarily affirmed.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

resolve and then Dr. Harding referred her to a neurologist⁴. But before claimant could be seen, she began to have problems retaining urine, a condition that took her to the emergency room where she was seen by Dr. Holladay, a neurosurgeon. Following an MRI, Dr. Holladay concluded claimant required surgery to address a herniated disc.

At some point during this time, Ms. Kolenda informed her insurance broker of the claimant's accident and she believed that he forwarded the information and the claim to her insurance carrier. According to Ms. Kolenda, she didn't hear back from the insurance carrier for "several weeks"⁵ When asked, Ms. Kolenda was unable to remember the date she told her broker or the date that she was first contacted by the carrier. But she confirmed that this notice was completed before her daughter had the MRI.

In the meantime, Dr. Holladay performed a lumbar microsurgical decompression to address what he diagnosed as a "large" herniated disc with an inferior fragment.⁶ After 6 weeks, claimant was returned to work with permanent restrictions which respondent has been able to accommodate. Claimant does, however, have ongoing complaints of pain in her back and periodically some radiating pain in her left leg. The intensity of the pain varies from day to day and prolonged standing and continuous bending or stooping causes the pain to increase.

Certain portions of Dr. Holladay's records were submitted into evidence during the course of the trial of this matter. According to these records, Dr. Holladay has opined that claimant bears an 8 percent permanent partial impairment and that her leg and back pain have resolved. Dr. Holladay's report suggests he used "the American Medical Association's 'Guides to the Evaluation of Permanent Impairment'".⁷ This report does not indicate which edition of the *Guides* Dr. Holladay utilized, nor does the report explain his methodology in arriving at the 8 percent figure.

Claimant was also evaluated by Dr. James A. Stuckmeyer on August 23, 2006 at the request of her lawyer. Dr. Stuckmeyer described claimant's injury as a "major blow out" of a disc, causing an "exploded" disc.⁸ He noted that in spite of the surgery, she continues to experience a decreased sensation in the distribution of the SI nerve root along with periodic shooting pains in her left leg.

⁴ R.H. Trans. at 33.

⁵ Kolenda Depo. at 8.

⁶ Stipulation at 5 (filed June 20, 2007) (Dr. Holladay's Aug. 3, 2005 report).

⁷ *Id.* at 2 (Dr. Holladay's March 30, 2006 letter to Continental).

⁸ Stuckmeyer Depo. at 5.

Dr. Stuckmeyer assigned a 20 percent permanent partial impairment to the whole body as a result of the claimant's July 13, 2005 accident. When asked to explain how he arrived at that figure, Dr. Stuckmeyer explained that claimant's diagnosis qualified for a DRE III impairment rating which is 10 percent. But because she continues to suffer from significant low back and radiating leg pain, he felt that she qualified for an additional 10 percent impairment under the pain grid provided for in the *Guides*.⁹ He further explained that it was his view that the *Guides* provided a framework for issuing impairment ratings and that physicians were given latitude in assigning impairment based upon their experience. And because he found claimant's complaints credible and because she had suffered such a significant herniation in her spine, he felt that she was entitled to a 20 percent permanent partial impairment finding. Simply put, Dr. Stuckmeyer testified that he believes the *Guides* provide a *range* of ratings within the DRE categories. He did, however, concede that she had no loss of motion segment integrity and that under the terms of the *Guides* she did not qualify for a DRE IV impairment rating, which yields a 20 percent. Nevertheless, he maintained his opinion that she bears a 20 percent permanent partial disability to the whole body.

The ALJ concluded that "[b]oth ratings left something to be desired in terms of clarity, but neither was so deficient as to render it irrelevant or unreliable."¹⁰ So, he averaged the two and assigned a 14 percent to the whole body, a finding that both parties dispute.

The Board has considered the parties' arguments as to the nature and extent of claimant's impairment and finds that the Award should be modified. Dr. Holladay's report does not indicate which edition was utilized in formulating the claimant's impairment. The law requires the 4th edition be used¹¹. Also, it is unclear as to how Dr. Holladay assigned an 8 percent in light of the DRE found in the *Guides*.

In contrast, Dr. Stuckmeyer testified as to his methodology in assigning the 20 percent permanent partial disability. And while the Board does not endorse Dr. Stuckmeyer's view that the DRE Categories permit a "range" of impairment ratings, the Board does find his explanation and rationale to assign an additional 10 percent for pain over and above the 10 percent for the DRE III classification persuasive. For these reasons, the Board is more persuaded by the opinions of Dr. Stuckmeyer and therefore modifies the Award to reflect a 20 percent whole body permanent partial disability.

The ALJ also concluded the expenses associated with the claimant's surgery were unauthorized because there was "no evidence to indicate the services at Providence

⁹ *Id.*, Ex. 5.

¹⁰ ALJ Award Nunc Pro Tunc (July 20, 2007) at 7

¹¹ K.S.A. 44-510e.

Medical Center and the surgery with Dr. Holladay were authorized by the respondent or its insurance carrier.”¹² This finding ignores the fact that Betty Kolenda authorized claimant to treat with Dr. Harding and that Dr. Harding authorized the referral to a neurologist. Also, even though Ms. Kolenda informed the insurance carrier of the claim, the carrier failed to contact her or claimant before the surgery. It likewise ignores the evidence that claimant should not delay the surgery given the uncontroverted fact that she was experiencing difficulty retaining urine. According to claimant, Dr. Holladay recommended she have surgery rather quickly based upon this finding. And Dr. Stuckmeyer testified that such a finding indicates that a nerve was affected by the disc herniation and that it was time-critical to address that complaint in order to avoid permanent damage to the nerve. Although respondent contends that there is no evidence to support claimant’s contention that she was incontinent, *she* has testified to that effect. And while Dr. Holladay’s records, *at least those that were included within the stipulation*, do not reflect that complaint, that alone does not negate claimant’s testimony.

Under these facts and circumstances, the Board finds that the ALJ’s finding with respect to the medical bills should be reversed. It is uncontroverted that claimant’s injury was significant and required swift medical attention. The carrier was informed of the claimant’s injury but took no action until after the surgery. The record is unclear as to when the chiropractor’s bills were paid, but it appears that those bills were not paid until after the surgery. And it is reasonable to assume that, based on the record, the insurer did not step in and attempt to address this claim until claimant had already had surgery. In the meantime, respondent knew of the claimant’s injury, offered her treatment and was well aware that claimant was referred to a physician to address her radiating leg pain as well as the ultimate need for surgery. Although the record could have been more illuminating, the Board finds that the carrier failed to provide treatment in spite of having been notified by respondent of the compensable claim.¹³ Thus, the Board reverses the ALJ’s findings and concludes the medical bills associated with claimant’s injury are respondent’s and its carrier’s responsibility.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Awards of Administrative Law Judge Kenneth J. Hursh dated July 9, 2007 and July 20, 2007, are modified in part and reversed in part.

The claimant is entitled to 5.71 weeks of temporary total disability compensation at the rate of \$336.61 per week or \$1,922.04 followed by 83.00 weeks of permanent partial

¹² ALJ Award Nunc Pro Tunc (July 20, 2007) at 5.

¹³ K.S.A. 44-510j.

disability compensation at the rate of \$336.61 per week or \$27,938.63 for a 20 percent work disability, making a total award of \$29,860.67.

As of November 15, 2007 there would be due and owing to the claimant 5.71 weeks of temporary total disability compensation at the rate of \$336.61 per week in the sum of \$1,922.04 plus 83.00 weeks of permanent partial disability compensation at the rate of \$336.61 per week in the sum of \$27,938.63 for a total due and owing of \$29,860.67, which is ordered paid in one lump sum less amounts previously paid.

Respondent is also ordered to pay claimant's medical bills associated with her July 13, 2005 accident specifically including the bills associated with claimant's surgery at Providence Medical Center.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge